PLM-1

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

10,426

FILE: B-192562 DATE: June 11, 1979

MATTER OF: Request for ~~Judges~~ Milton Morvitz, et al. - Social Security Administration Administrative Law Within-Grade Salary Increases

DIGEST: Administrative Law Judges, who served as temporary GS-14 Black Lung Hearing Examiners, request retroactive adjustment of pay on basis of highest previous rate rule. They are not entitled to adjustment because application of highest previous rate rule is discretionary and rate was properly set in accordance with the agency's regulations when they were given permanent GS-13 positions pursuant to Pub. L. No. 92-603. However, they should be given credit for time spent in GS-14 Black Lung position toward within-grade increases in their GS-14 Administrative Law Judge temporary positions under Pub. L. No. 94-202 since their reassignment to such positions did not start new waiting periods.

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This decision is in response to a claim by Social Security Administration (SSA) Administrative Law Judges (ALJ) Milton Morvitz, Wanda M. Lewandowski, Jack R. Reed, Aubrey L. Tomlin, and Robert B. Bell, for within-grade salary increases under the provisions of 5 U.S.C. § 5335 (1976). We have also been advised by the Director, Office of Personnel Policy, Office of the Secretary, Department of Health, Education and Welfare (HEW), that there are about 100 ALJs whose circumstances are the same and that they will also be affected by this decision.

DLC 01771

Administrative Law Judges are normally given career appointments under 5 U.S.C. § 3105 (1970) and 5 C.F.R. Part 930, subpart B. However, the Supplemental Appropriations Act of 1972, Pub. L. No. 92-184, 85 Stat. 627 (Dec. 15, 1971), gave authority to the Commissioner of Social Security to appoint persons to conduct hearings arising out of the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 901 (1970), without meeting the requirements for hearing examiners appointed under 5 U.S.C. § 3105. The Civil Service Commission determined that the Black Lung Hearing Examiners (BLH examiners) would be in the excepted service. The Act placed a time limit on the duration of the authority to not later than December 31, 1973; however, the date was extended several times by subsequent legislation. The appointments were made on a not-to-exceed basis, and were classified at the GS-14 grade.

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In our decision of October 26, 1972, B-164031, we held that these excepted service, time-limited appointments were analogous to term appointments in the competitive service and that the hearing examiners serving under the not-to-exceed appointments were entitled to within-grade salary increases. See also 58 Comp. Gen. 25 (B-191861, October 20, 1978). Thus, the individuals were advanced from step to step under the provisions of 5 U.S.C. § 5335 (1970).

Section 1631(d)(2) of the Social Security Act, as added by section 301 of Pub. L. No. 92-603, 86 Stat. 1476 (Oct. 30, 1972), 42 U.S.C. § 1383(d)(2) (Supp. II, 1972), authorized the Secretary of HEW to appoint hearing examiners to conduct hearings related to the Supplemental Security Income provisions of that Act without regard to the requirements for hearing examiners appointed under 5 U.S.C. § 3105. Positions for these individuals were established as Attorney-Examiner (General) at the GS-13 level. These individuals are referred to as SSI hearing examiners and there was no time limit on their appointments.

The agency report states that SSA was concerned that the GS-14 BLH examiners might leave their time-limited temporary appointments to take a GS-13 SSI hearing examiner permanent position without a time limit. Because of the critical need for personnel to continue working on the Black Lung cases until the backlog could be reduced, a plan was devised by HEW in 1973 or 1974, to give the BLH examiners who so desired appointments to SSI examiner positions to assure them of positions in the SSI program when the Black Lung appointments were terminated. To avoid dual compensation, they were immediately placed in a leave-without-pay (LWOP) status in the GS-13 positions, and they continued to be paid at the GS-14 rate of the Black Lung position. Thus, each individual held a permanent position at the GS-13 level, and a temporary position in the nature of a detail, at grade GS-14.

Public Law No. 94-202, 89 Stat. 1135 (Jan. 2, 1976), repealed section 1631(d)(2) of the Social Security Act. However, provision was made in Pub. L. No. 94-202 for persons who had been appointed under section 1631(d)(2) to continue to serve for a period not to exceed December 31, 1978, during which time they could, if the Secretary of HEW so determined, conduct hearings under Titles II, XVI, and XVIII of the Social Security Act. The Secretary made that determination, 41 Fed. Reg. 9242 (March 3, 1976), and a position of Administrative Law Judge (temporary) GS-14, was established to reflect the additional duties that could be added to the SSI position.

Public Law No. 94-202 did not provide for any new appointment as ALJs; therefore, only those individuals holding permanent positions as SSI hearing examiners, GS-13, were eligible. Thus, HEW returned the BLH examiners to duty from an LWOP status to their permanent positions as SSI hearing examiners. At the same time the Black Lung positions were terminated and the employees were promoted to the GS-14/Administrative Law Judge (temporary) positions. Section 371 of Pub. L. No. 95-216, 91 Stat. 1559 (Dec. 20, 1977), converted the appointments of the hearing examiners to career-absolute at the GS-15 grade, and all are now permanent Administrative Law Judges, GS-15.

The two significant actions on the part of HEW that gave rise to these claims occurred when the BLH examiners were given permanent appointments as GS-13 SSI examiners in 1974 and 1975, and continued to serve in their temporary positions as BLH examiners, and again in 1976, after the passage of Pub. L. No. 94-202, when the BLH examiners were returned to their GS-13 SSI examiner positions and promoted to GS-14 temporary Administrative Law Judge positions.

The claimants state that HEW did not apply the "highest previous rate rule" in 1974 and 1975 when they were appointed to their permanent positions at the GS-13 level, and placed in an LWOP status in the GS-13 positions while they continued to serve as BLH examiners, GS-14. The claimants allege that this action was contrary to HEW policy, and that inequities occurred because those individuals who chose not to continue as BLH examiners, and remained as SSI examiners were given the advantage of the highest previous rate rule. This action on the part of HEW had the effect of placing the claimants at a lower step in grade in 1976, after the passage of Pub. L. No. 94-202, than the individuals who remained as SSI examiners. For example, an SSI examiner who, in 1974 or 1975 did not remain a BLH examiner was given a step 9 in grade GS-13 because of the application of the highest previous rate rule and was placed at a grade GS-14, step 6, upon promotion in 1976 to an ALJ (temporary). On the other hand, the individuals who remained as BLH examiners were given a step 5 or 6 in permanent grades of GS-13 because HEW did not apply the highest previous rate rule to them. When they were given appointments as ALJs (temporary) in 1976, they remained at step 4 of GS-14. These individuals were then detailed back to serve as BLH examiners at their prior rate of GS-14, step 4.

The claimants state that their principal claim is that they should have been given two or more in-grade step increases in GS-13 in 1974 and 1975. However, they also point out that they have been in grade GS-14, step 4, in excess of 2 years, although only 2 years in grade is required for promotion to the next step. 5 C.F.R. § 531.403(a)(ii) (1976).

The rate of basic pay to which an employee is entitled upon change of position or type of appointment is governed by regulations prescribed by the Civil Service Commission (now the Office of Personnel Management) 5 U.S.C. § 5334 (1970). The Civil Service Commission prescribed such regulations in title 5 of the Code of Federal Regulations, section 531.203(c) (1976), which states in pertinent part that:

> "* * * when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. * * *" (Emphasis added.)

We have consistently viewed this regulation as vesting discretion in the agency regarding application of the so-called "highest previous rate rule" in the establishment of an employee's rate of pay. Paswater, B-191881, July 25, 1978; Russell, B-186554, December 28, 1976.

The Department of Health, Education and Welfare concedes that it applied the highest previous rate rule in some cases and not in other cases. The HEW further states that it was unable to determine from its records the basis for the decision in each case. However, it states that:

> "* * * Departmental policy is that, with certain exceptions, an employee's pay will be set on the basis of his highest previous rate. * * * but appointing officers are authorized to pay less than the highest previous rate when such rate is not considered warranted. Thus, in applying the highest previous rate rule, BHA [Bureau of Hearings and Appeals, SSA] had the authority to determine the

rate that was warranted and to set pay accordingly. We believe that BHA made the appropriate determinations in concluding that the employees should be restored to the GS-14 pay they were receiving under their not-to-exceed appointments."

We agree with HEW as to its determinations under the highest previous rate rule. The HEW has promulgated regulations pertaining to pay under the General Schedule in HEW Instruction 531-2. The Instruction states in pertinent part:

"531-2-40 USUAL POLICY

"A. FPM 531, Subchapter 2 states the requirements for determining the rate of basic pay. Within these requirements, the Department may exercise discretion in setting the salary of a person with previous Federal service whose highest previous rate (as defined in the FPM) was above the minimum scheduled rate of the General Schedule grade to which he is being appointed or changed. Where such discretion is permitted, the Department's policy is as follows:

"1. Unless otherwise provided in this Instruction, the employee's pay will normally be set on the basis of his highest previous rate in accordance with the provisions of FPM 531, Subchapter 2-4. For instance, if the highest previous rate falls between two steps of a grade, the higher of the two steps will be chosen unless otherwise specified in this Instruction or the FPM.

* * * * *

"B. The appointing official shall make sure that employees in like circumstances are treated alike.

"531-2-50 EXCEPTIONS TO THE USUAL POLICY

"A. Appointing officers are authorized to pay less than the highest previous rate when such rate is not considered warranted. The following are examples of such circumstances:

* * * * *

"3. The employee is changed to a lower grade at his own request with good prospects of re-promotion. Select a rate in the lower grade which upon re-promotion would place the employee at a rate of pay he would have attained had he remained at the higher grade." (Emphasis supplied.)

It is apparent that HEW has a policy of applying the highest rate rule, but the emphasized portions of the Instruction plainly point out that this policy is discretionary. Further, the facts in this case indicate that the exception in HEW Instruction 531-2-50-A-3 would have applied in 1974 when the BLH examiners were assigned to a permanent position as SSI hearing examiners, GS-13. The employees did so at their own request in order to gain permanent status. Thus, HEW followed the instructions for determining the rate of basic pay in FPM Supplement 990-2, Book 531, subchapter S2-4b(3) (revised July 1969) which provides that:

"(3) Objectional use of highest previous rate. When an employee is demoted at his own request with the prospect of repromotion back to the former grade as soon as possible under merit promotion rules (e.g., a demotion to acquire status), agencies should select a rate in the lower grade which upon promotion back will place the employee in the rate in the higher grade which he would have attained had he remained in that grade."

The claimants also allege that HEW did not treat all of the employees in like circumstances alike and thus were arbitrary. Although the record is silent in the matter, it appears (1) that the agency applied the highest previous rate rule only to those employees who remained as SSI hearing examiners, and (2) that those who

elected to return to their duties as BLH examiners were placed in steps in GS-13 which, upon re-promotion, would place them at the rate of pay they would have attained had they remained at the higher grade. Therefore, HEW exercised its discretionary authority and treated the individuals in each group alike.

We have also held that the highest previous rate rule should not be used as a vehicle to circumvent the period required for within-grade salary advancements. 35 Comp. Gen. 370 (1955). This would have occurred in 1974, if HEW had applied the highest previous rate rule and then repromoted the employees to GS-14. Section 531.203(c), title 5, Code of Federal Regulations, and HEW Instruction 531-2 give broad discretion to agency appointing officials to grant or deny the highest previous rate in a variety of personnel actions. Where agency action is committed to agency discretion, the standard to be applied by the reviewing authority in reviewing the action of the agency is whether the action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Arbitrariness and capriciousness exist if agency action lacks a rational basis. 54 Comp. Gen. 310 (1974). There is no evidence in the record that the agency's action lacks a rational basis.

In view of the above, we must conclude that there was nothing improper in HEW's refusal to apply the highest previous rate rule to those individuals concerned.

The claimants also argue that HEW was again given the discretion to apply the highest previous rate rule in 1976. At that time the Black Lung position was terminated pursuant to Pub. L. No. 94-202, and HEW administratively removed the BLH examiners from their LWOP status. This action on the part of HEW apparently had the effect of returning the BLH examiners to their permanent position as SSI examiners, GS-13. By Standard Form 50, Notification of Personnel Action, the claimants were then placed in the position of GS-14 ALJs (temporary) as established by Pub. L. No. 94-202.

As previously stated, the agency has broad discretion in its application of the highest previous rate rule. Moreover, because of our subsequent disposition of the second issue involved in this case, that of credit for time spent in a within grade, we are of the opinion that it is not necessary to further discuss this issue at this point.

The HEW has also suggested that there is justification for treating the action pursuant to Pub. L. No. 94-202 as though it were a reassignment from one GS-14 position to another, and thus give credit for the time spent in the GS-14 position toward a within-grade increase in the GS-14 Administrative Law Judge temporary position.

Public Law No. 94-202 applied only to those employees who held SSI hearing examiner appointments. Thus, HEW apparently believed it was necessary to administratively transfer the BLH examiners from their temporary GS-14 positions to their permanent positions as SSI examiners, GS-13, in order to comply with the provisions of the Act. The HEW also states that it can find no basis for any conclusion other than the promotions from GS-13 to GS-14 are equivalent increases in pay under the provisions of 5 U.S.C. § 5335(a)(A) (1976), and the employees were required to begin new waiting periods on the date of such promotion.

Under the terms of 5 U.S.C. § 5335(a), the concept of equivalent increase is only used to determine whether an employee may be granted a within-grade step increase. That authority does not address the issue of the rate at which an employee's pay is to be set upon permanent promotion. B-189324, October 18, 1977. In that decision we held that it was not necessary to restore an employee who had been temporarily promoted to his permanent lower grade when he was permanently promoted to a different position in the higher grade. Likewise, we do not believe there is a requirement to restore an employee who has been temporarily promoted to his permanent lower grade before reassigning him to a second temporary position in the higher grade.

A reassignment is defined in 5 C.F.R. § 531.202(j) (1976) as a change of an employee, while serving continuously in the same agency, from one position to another without promotion or demotion. In this case the BLH examiners were assigned to a temporary position from 1972 until 1977, when the passage of Pub. L. No. 95-216, 91 Stat. 1559, changed their appointments to career-absolute. Under the provisions of Pub. L. No. 94-202, supra, the authority to appoint SSI hearing examiners was repealed and the Secretary of HEW was authorized to select the examiners who had been previously appointed to conduct hearings under titles II, XVI, and XVIII of the Social Security Act. However, there was no requirement in Pub. L. No. 94-202 that BLH hearing examiners, who had appointments as SSI hearing examiners and were in an LWOP status in their

GS-13 positions, had to have their LWOP status terminated before receiving ALJ appointments authorized by Pub. L. No. 94-202. Also, as noted above, an employee who has been temporarily promoted, is not required to be restored to his lower grade position before assignment to a second position in the higher grade. In this case the record shows that the personnel involved never received pay at the GS-13 level in their permanent positions, their duties remained the same, that of Black Lung hearing examiners, and they were paid for the entire period as temporary GS-14s.

Accordingly, under the circumstances, the BLH examiners did not begin new waiting periods when they received appointments pursuant to Pub. L. No. 94-202 and they should be given credit for the time spent in the GS-14 Black Lung position toward within-grade increases in the GS-14 Administrative Law Judge temporary positions. Also, when the credit of such time results in within-grade increases in the ALJ GS-14 and GS-15 positions, appropriate pay adjustments should be made.

Deputy Comptroller General
of the United States